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UNJUST ENRICHMENT AND RESTITUTION: DEFINING AND MEASURING CURRENT BENEFITS FROM PAST WRONGS—ESTIMATION AND POLICY IMPLICATIONS

*Richard F. America**

Summary

- Income has been coercively diverted interracially by means of slavery and past discrimination.
- This currently produces an unjust enrichment.
- To remedy this it is necessary to estimate the amount of these benefits, identify the class of beneficiaries, and, finally, redistribute income from the wrongful beneficiaries to the classes, if not the individuals, who have been exploited, excluded and discriminated against.
- Tools available for achieving this remedy include: legislation, litigation and constitutional amendment.

This discussion of reparation/restitution seeks outcomes that satisfy victims, strengthen the overall economy and serve the general public interest.

It should have value for advocates of the interests of the poor and the victims of injustice, for those interested in public policy formation, and for corporate managers who seek effective strategies for social improvement.

This point deserves emphasis. In the 1960s the reparations concept was introduced in a volatile, hostile atmosphere. It was proposed in a punitive spirit and in emotional tones. Manifestos were nailed to church doors. Religious bodies received demands. And the discussion was imprecise.

The concept deserves better. It should be a matter of sober debate among people looking for rational choices to serve the general public interest. It should not be simply a matter of

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group self-interest. This paper is concerned with what is good for the economy and society as a whole, and argues that festering injustice cannot be good for the United States in the long run. Therefore, to recognize and pay the debt is a matter of sound politics, and corporate and public policy.

I. INTRODUCTION

There is a fundamental flaw in the way this issue is usually conceived—Compensation for *Past Injustices*. The problem is to define and correct a current, not a past, injustice. The current injustice concerns the receipt and retention of income and wealth wrongfully produced in the past. The key is to focus on the current, the present value and distribution of the benefits from past transactions.

This paper emphasizes how research and statistical estimation can contribute to the discussion, and how restitution or reparations can be accomplished through the normal process of taxation and budgeting targeted to accelerate economic development.

A constitutional amendment perhaps can be proposed to stimulate debate. But as a practical matter the problem can, perhaps, more effectively be addressed through straightforward legislation or litigation or both.

It has been asserted that race has declined in significance in terms of discrimination,¹ and in some social and professional worlds that is so. But many public and corporate policy issues of how to revitalize the economy and how to reinvigorate specific corporations and industries, are race related. Such issues concern how we distribute resources, and whether we will simply accept the way markets have created the social and class relationships we inherited. The question is whether we want to change the relative standings of social groups by government intervention and investment in real capital formation.

We are not used to talking about economic injustice and exploitation. But many social, macroeconomic and corporate problems derive, largely, from past injustices.

Historic interracial relations in labor and capital markets and in education and training have lasting effects. But, we have

1. W. J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1980).

had little sense of how these affect current distributions of income and wealth by race. If we rigorously examine the benefits of past economic relations it may lead to a reparations concept on which to base litigation, legislation, public policy or even an amendment. It will be useful to know how the current economic standing of large social groups, such as races, are affected by past policy and practice.

Understanding such "unjust enrichments" will allow public policy remedies of targeted redistributive programs financed through progressive taxes. We have had trouble framing policy options because we lack information that could help us evaluate redistributive alternatives. Interracial income redistribution encounters resistance because, in part, we believe we are entitled to keep what we have, having earned it fairly and received it justly. But if income and wealth distributions derive, in part, from past injustices and transactions that violate current norms, we need to understand that.

II. CURRENT BENEFITS FROM PAST INJUSTICE²

In a recent year, Afro-Americans comprised roughly twelve percent of the U.S. population.³ Had they received twelve percent of total income, instead of the 7.2% they actually realized, they would have earned \$264 billion, instead of \$159 billion. Approximately half of that \$105 billion gap can be explained by discrimination in employment. If so, it may also be that the other \$52 billion was diverted to others who thereby received an unjust enrichment. If this annual injustice accumulates and is compounded, it may contribute to income and wealth shares.

By one estimate, the present value, adjusted for price changes, of the benefits from such discrimination, from 1929 to 1968, is over \$600 billion.⁴ If we extend the analysis back through the eighteenth and nineteenth centuries, the benefits may be larger.

2. This section, in particular, heavily relies upon statistical research by G. Udinsky, and B. Chachere and summarized by R.F. America, in G. Udinsky, B. Chachere & R.F. America, Working Paper #1, Office of Urban Programs, Schools of Business Administration, University of California, Berkeley (1972) (unpublished).

3. U.S. Bureau of the Census, Statistical Abstract of the United States: 1987 (107th ed.).

4. UDINSKY, CHACHERE & AMERICA, *supra* note 2.

We can choose any period and apply any of several techniques. The important thing is to look at discrimination this way, and to examine the implications.

The exercise at the University of California, Berkeley, in 1972, estimated benefits from certain discrimination from 1929 through 1968. This work has now been updated to find the present value in 1987 adjusted for current prices. The research builds on Lester Thurow's pioneering book, *POVERTY AND DISCRIMINATION*,⁵ and his later work, *GENERATING INEQUALITY*.⁶

Who benefits from discrimination, and by how much is a fundamental issue overdue for attention? Michael Reich finds that certain classes of whites benefit—employers of low skilled and unskilled blacks, and white investors and certain professionals.⁷

In macro terms, total output might be greater if there were no discrimination. But that is not the issue here. We want to determine which classes benefit, whether or not they unwittingly suffer a loss relative to what they might have gained were there no discrimination. If some classes are hurt by the decisions of other classes to discriminate against blacks, that is worth knowing. But it is also worth knowing who benefits and by how much.

The analysis does not question the extent to which race explains differences in median income. It accepts David Swinton's finding,⁸ and assigns racial discrimination a large role in explaining the difference. It uses that in estimating the benefits.

Lester Thurow estimated that \$15 billion, plus or minus \$5 billion, would be the range of annual white benefit from labor market discrimination (setting aside capital discrimination, monopoly power discrimination against black capital, and racial price discrimination in consumer goods, housing, services, insurance and so on).⁹ The Berkeley paper assumed that the primary beneficiaries are upper middle and upper income white investors and professionals, and those who employ large numbers of black

5. L. THUROW, *POVERTY AND DISCRIMINATION* (1969). [hereinafter *Pov. & Disc.*].

6. L. THUROW, *GENERATING INEQUALITY* (1975). [hereinafter *GENERATING INEQUALITY*].

7. M. REICH, *RACIAL INEQUALITY* (1981).

8. 40% to 60% of the difference in median incomes is due to discrimination. D. H. Swinton, *The Limits of Anti-Discrimination Policy* (unpublished).

9. *POVERTY AND DISCRIMINATION*, *supra* note 5, at 134.

unskilled and semi-skilled labor.¹⁰

It used a modified version of Thurow's model. The estimation encountered serious data limitations, and therefore presents illustrative, but rough approximations.

There has been much analysis of the consistent disparity between black and white income.¹¹ Age, occupation, sex, family structure, education, culture, genetics, geographic location and other factors have been cited as explanatory variables. But in addition to those factors, pure racial discrimination and exclusion accounts for a large portion of observed differences. There appears to be an emerging consensus that about fifty percent of the difference is caused by discrimination.

Cultural and other factors, that explain part of the difference, have been taken into account in accepting fifty percent as the residual due to discrimination. But, it is unlikely that differences in taste for work, rewards, and for leisure would persist over 15 generations, or 350 years, in an open market, equal opportunity environment.

Slavery might have ended, say, in 1790 or 1820, or at other times as proposed. Had that happened, and had opportunities to work and be trained been equal, in an open nondiscriminating market, then by 1988 there would likely be no gross differences in earned income of a magnitude that would foster a continuing argument.

In this sense, it could even be assumed that 100% of current income differences arise ultimately from discrimination. Fifty percent is a conservative estimate. Most of the difference arises from differential in opportunities and access, and reflect unjust market processes that coercively divert income interracially.

John K. Galbraith first observed, and Daniel P. Moynihan concurred,¹² that "statisticians are key actors in the process of social change, for it is often only when it becomes possible to measure a problem that it also becomes possible to arouse any political interest in solving it."¹³ So it is with race related policy issues.

10. Udinsky, Chachere, & America *supra* note 2.

11. See, e.g., A. PASCAL, RACIAL DISCRIMINATION IN ECONOMIC LIFE (1972).

12. D. P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING (1970).

13. *Id.* at 198.

III. TYPES OF DISCRIMINATION¹⁴

Wage Discrimination results in blacks and whites of the same sex, occupation, and education receiving different wages for the same job. We assume that blacks and whites of the same sex, occupation, and education are comparable and should receive the same wages for the same job.

Occupational discrimination systematically channels blacks into lower paying jobs. Given white and black persons, with the same education and experience, who work equally hard, there is a tendency for the blacks to find themselves in lower paying jobs. This results from occupational discrimination.

Employment discrimination occurs when blacks are disproportionately and systematically last hired and first fired—or simply not hired.

Unions share responsibility for this. Union members tend to be first hired and last fired. The extent to which non-union status characterizes blacks helps produce greater than average black unemployment rates.

There is also *human capital discrimination*¹⁵ which occurs when less government and private funds are invested in black human capital than in white, or when blacks are prevented from investing in their own human capital at levels they would prefer. Whites benefit from limiting human capital investment in these ways because their human capital becomes more valuable than it otherwise would have been in a competitive environment.

There is also *monopoly power discrimination*.¹⁶ This occurs when there are monopoly profits and blacks are prevented from entering economic activity in which monopoly returns are realized. Whites control most monopolies. This allows their incomes to rise higher than it otherwise would to the extent that their monopolies derive extra profits from black consumers.

*Capital market discrimination*¹⁷ prevents blacks from borrowing or receiving venture capital and other investments entirely or at competitive rates. This blocks acquisition of wealth.

14. GENERATING INEQUALITY, *supra* note 6, at 155-81.

15. *Id.* at 166.

16. *Id.*

17. *Id.*

Finally, *price discrimination*¹⁸ affects real incomes so that blacks are not able to purchase equal amounts of goods and services of similar quality with the same incomes as whites.

Benefits from these forms of discrimination should also be measured. In the final analysis, these benefits may outweigh those from wage, occupational and employment discrimination.

Until recently we could not estimate any of the benefits. Now we can because we have better economic theory, data, statistical technique, and most important, computers.

There are several alternative ways to derive these estimates. The approach used, based on Lester Thurow's model, is only illustrative. It is far from the last word on estimation. Indeed, it is rough and oversimple. But it shows that discrimination yields benefits.

The process begins by determining white average income minus what it would be if whites were distributed in jobs the same way the total population, white and non-white, is. This difference is then applied to the total white labor force. That gives the benefit from disproportionate access to good jobs and education.

Then we compare average white income and average total income. The difference between these is applied to the total number of white workers. And that yields what white total income would be if whites were distributed according to our expressed ideals of fairness and did not enjoy the advantages that discrimination offers.

Reduced competition for higher paying jobs, occupational discrimination, increases the incomes of those who hold those jobs over what it would otherwise have been.

Employment discrimination, finally, results from blacks being underrepresented among the employed. The total employment rate is the rate whites would experience if there were no employment discrimination in their favor. The difference between white employment rates and total employment rates gives the resulting estimate of the value of this discrimination.

The benefit is found by comparing, algebraically, white average income minus what white average income would be if whites were distributed by sex, occupation and education as is

18. Id.

the total population, rather than skewed as is the case in reality.¹⁹ This difference is then applied to all whites in the labor force, and this yields the net benefit resulting from favorable occupational distribution.

The difference between white average income and total average income reflects wage discrimination.

We assume for purposes of these rough estimates that average income of the unemployed is approximately the same as average black income over this historical period; and that total unemployment, which is higher than the white rate, is the rate whites would bear if there were no employment discrimination. Given our assumption that fifty percent of the difference between white average income and total average income reflects wage discrimination.

We then find the income that would have been lost by whites if employed only at the rate of the total population as against income lost by whites actually unemployed. Then we estimate the income that would have been lost by whites if they were unemployed at the same rate as the total population, and also the income lost by whites who were actually unemployed.

The white loss would have been greater had they been unemployed at the general unemployment rate. So the benefit is the difference between the larger hypothetical loss (whites unemployed at the same rate as the total population) and the smaller actual loss experienced by unemployed whites.

Census data on income by occupations and education were available after 1940. Prior to 1940, however, the census does not show income by occupation and education. The model was adjusted for each census to respond to changes in how the data change. The benefits were capitalized to find the present value. The GNP deflator was used to convert the benefits to 1972 prices.

The 1972 present value of benefits from occupation, education, employment and wage discrimination from 1929 to 1969 is roughly \$350 billion.²⁰ Adjusted to 1987 it is over \$600 billion.

The interest rate used was the average of long-term government bond yields. The use of long-term government bond rates

19. Udinsky, Chachere & America *supra* note 2.

20. *Id.*

probably underestimates the present value of the benefits.

These estimates give, in a crude way, the benefits from discrimination. Such information is required to develop a restitution/reparations case.

IV. OFFSETS

One might say,

Well, that's interesting, but surely the social debt has been more than repaid through transfer programs, The Great Society and the like; social security, unemployment compensation, public assistance and other direct money transfers, as well as other in-kind programs. And we should also include the business set aside and assistance programs and private charity. We must have paid it off by now.

If we estimate the level of such transfer payments and the portion of the social debt that could reasonably be considered repaid, the debt would, at most, be reduced by twenty percent. For over half the years between 1870 and 1986, transfer payments were substantially less than they have been recently. So even generous assumptions on payback leaves conservative estimates at over \$500 billion for the period 1929 to 1986.

Someday soon, we can have an annual "Economic Injustice" or "Exploitation" Index. It would tell us how much groups benefit from unjust economic relations with each other in a kind of input-output matrix. This kind of information, will do more to end injustice than thousands of sermons, or even rules, regulations and laws.

One can obviously criticize such crude estimates. Any time a series of numbers is treated with an interest rate, even a low one like three percent, and then compounded over many years, it will produce a large number.

The assumptions and premises necessary to perform this kind of analysis, using any approach, also can be questioned, and rightly so. But it's intuitively obvious that benefits flow to someone from all forms of discrimination. Certain classes receive them, and pass all or part of them on to future generations as a kind of collective bequest. The exact numbers, and even this particular estimating technique, are not the point. The concept

is what's important.

V. REMEDIES

We need to recognize and remedy all economic injustice to improve the overall economy. We see injustice in discrimination and exploitation based on gender, ethnicity, race, and religion. All diminish economic performance. All deserve to be discouraged and remedied. Reparations is one remedy.

By focusing on problems of race and poverty this way, decision makers will be able to: 1) recognize that poverty hurts the economy and is rooted in injustice; 2) recognize that there are benefits from economic injustice, and a resulting social debt, and 3) pay restitution/reparations by investing in housing, health, education, employment, crime prevention, affirmative action, and small business development.

There are widespread feelings of injustice. These are not compatible with the mutual respect between leaders and followers that we need. Resentment corrodes our economy. It destroys the bond that generates freely given respect and support. We can't generate economic trust if people feel the system is unfair, and that they are victims of a massive historic injustice that could be corrected if we wanted honorable dealings.

We want to draw everyone into the work force, and help all people realize satisfaction, growth, security, achievement, a sense of pride and self-worth, and a valued place on the team. But our income and wealth distributions are much more skewed toward the upper end than distributions in most advanced nations. We are not immune from what that can do to any society.

Prescriptions for improvement abound. The debate is interminable. The distress continues. We may approach consensus on technical solutions. Savings, investment, training, education, labor, trade, antitrust, tax and capital formation, banking, and science and technology receive ample attention. Before long, we may have a handle on what to do about them.

A brief digression here. Much wealth unjustly realized through these processes now exists in the form of corporate holdings. Discrimination, exclusion and exploitation made it possible for benefitting classes to dominate most markets so that today every major market is characterized by a kind of racial monopoly in which one race, in a multi-racial society, controls

100% of assets or 100% of sales.

This kind of social overconcentration probably has the same harmful consequences as does monopoly in the traditional sense; it leads to restricted output, distorted prices, and limits on product innovation.²¹ Furthermore, the concentration of economic power carries with it the usual risk of political abuse.

For all these reasons, there is a need to develop a legal theory of social monopoly and innovative litigation to break up such social overconcentrations, leading to divestiture to increase interracial competition and reduce racial barriers to entry.

The key concept, however, is that culpable conduct cannot be the basis for the action. Instead, following the findings of Kaysen and Turner²² and the Shenefield Commission,²³ action has to be based on a finding that these kinds of concentrations of ownership and control are by their nature exclusionary, and that the structure per se is the problem, even where no illegal conduct is evident.

It is clear that economic improvement requires better use of measurement and information. Schools produce ill-prepared youngsters; factories are idle, under capacity, and obsolete; buses, subways, parks, and downtown streets are dangerous; taxes support the wretched. It doesn't have to be that way. The reparations concept is a tool that can help focus our thinking on redistributive remedies.

21. America, *Social Overconcentration, Structural Remedies and Minority Business*, J. ECON. ISSUES at 295-299, (1982).

22. C. KAYSEN & D. F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* (1959).

23. REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES (1979).

